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SUPREMACY OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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The Canadian Charter of Rights and Freedoms is Part I of the Constitution Act, 1982, which is part of the "Constitution of Canada". By virtue of section 52(1) of the Constitution Act, 1982, the Constitution of Canada is "the supreme law of Canada", and inconsistent laws enacted by the Parliament or a Legislature are of no force or effect. In this article the writer concludes that the Constitution Act, 1982, including Part I (the Charter) and section 52(1) (the supremacy clause), has been validly enacted by the United Kingdom Parliament, and has been effectively entrenched so that its provisions can only be amended by the new amending procedures laid down by Part V of the Constitution Act, 1982.

La Charte canadienne des droits et libertés constitue la Partie I de la Loi constitutionnelle de 1982, elle-même incorporée à la "Constitution du Canada". En vertu de l'article 52(1) de la Loi constitutionnelle, la Constitution représente la "loi suprême du Canada", et toute loi promulguée par le Parlement ou par une législature provinciale, incompatible avec la Constitution, est inopérante. Dans cet article, l'auteur conclut que la Loi constitutionnelle de 1982, comprenant la Partie I (Charte) et l'article 52(1) (primauté), a été validement promulguée par le Parlement du Royaume-Uni, et a été effectivement enchâssée dans la Constitution, de sorte que ses dispositions ne peuvent être amendées que par la nouvelle procédure de modification énoncée à la Partie V de ladite loi.

Introduction

The Canadian Charter of Rights and Freedoms¹ is part of "the supreme law of Canada" and therefore overrides any federal or provincial statute which is inconsistent with a provision of the Charter. This result is stipulated by section 52(1) of the Constitution Act, 1982,² which provides:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The "Constitution of Canada", to which supremacy is accorded by section 52(1), is defined in section 52(2) as including "this Act", which means the Constitution Act, 1982, of which Part I (sections 1-34) is the Charter.

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¹ The Canadian Charter of Rights and Freedoms (hereinafter referred to as "the Charter") is Part I (ss. 1-34) of the Constitution Act, 1982, which is Schedule B of the Canada Act 1982, 1982, c. 11 (U.K.).

² Schedule B of the Canada Act 1982, 1982, c. 11 (U.K.).

The Charter makes clear, in section 32(1), that its provisions apply to the federal Parliament and to the legislature of each province.³ By virtue of the supremacy clause (section 52(1)), therefore, the Charter constitutes a set of new limitations on the powers of the federal Parliament and provincial legislatures.⁴ Any statute which transgresses one of the new limitations is rendered "of no force or effect" by the supremacy clause.⁵

To be sure, the Charter, by section 33, permits the Parliament or a legislature to exempt a statute from some of the provisions of the Charter by inserting in the statute a "notwithstanding clause", that is, an express declaration that the Act is to operate notwithstanding certain provisions of the Charter (which must be specified in the declaration).⁶ To a degree, section 33 detracts from the supremacy of the Charter—but only to a degree. In the first place, section 33 is itself a restriction on legislative power, imposing as it does the "manner and form" requirement of the inclusion of a notwithstanding clause for statutes seeking exemption from certain provisions of the Charter, and (by subsections (3) to (5) of section 33) requiring also that the notwithstanding clause be re-enacted every five years. Nor are such requirements merely trivial since the enactment or re-enactment of a statute which includes a notwithstanding clause will obviously attract public attention and arouse political opposition. Secondly, section 33 does not extend to all of the provisions of the Charter, only to

³ This article will not explore the question of the extent to which the Charter applies to matters other than statutes. For more detailed analysis of s. 32, see Hogg, *Canada Act 1982 Annotated* (1982), pp. 75-78; Tarnopolsky and Beaudoin (eds), *Canadian Charter of Rights and Freedoms: Commentary* (1982), ch. 3 (Swinton).

⁴ Before the coming into force of the Constitution Act, 1982 the federal Parliament and the provincial Legislatures were subject to the limitations imposed by the constitutional provisions which distribute legislative powers between the two levels of government, making Canada a "federal" state. As well, there were a few other limitations on legislative power, for example, those contained in ss 93, 96-98, 99, 121, 125 and 133 of the Constitution Act, 1867, 30-31 Vict., c. 3 as am. Judicial review was therefore a well-established part of the Canadian legal system: see following note. But there was no bill of rights comparable in scope to that contained in the amendments to the constitution of the United States. The new Charter, by adding a new set of guarantees of civil liberties, will extend the scope of judicial review by adding a further set of grounds upon which a statute could be held to be invalid.

⁵ The supremacy clause of s. 52(1) also becomes applicable to the limits on legislative power which date back to before 1982, because those limits are all contained in instruments which form part of the "Constitution of Canada" (a term defined in s. 52(2)) to which supremacy is accorded by s. 52(1). Before 1982 there was no supremacy clause, but the courts held nonetheless that the provisions of the British North America Acts (1867, 30-31 Vict., c. 3 as am., now renamed the Constitution Acts) were supreme, and that the courts had the power of judicial review, that is, the power to hold a statute invalid which transgressed a constitutional limitation on the power of the enacting legislative body: See Strayer, *Judicial Review of Legislation in Canada* (1968), ch. 1; Hogg, *Constitutional Law of Canada* (1977), pp. 42-48.

⁶ For more detailed analysis of s. 33, see Hogg., *op. cit.*, footnote 3, pp. 78-81; Tarnopolsky and Beaudoin (eds.), *op. cit.*, footnote 3, pp. 70-73 (Marx).

section 2 and sections 7 to 15. The remaining provisions of the Charter cannot be turned aside by the enactment of a notwithstanding clause; and those remaining provisions of the Charter include the "democratic rights" of sections 3 to 5, the "mobility rights" of section 6, the "language rights" of sections 16 to 23, and the sexual equality right of section 28. I conclude, therefore, that section 33, with its provision for a notwithstanding clause, does not in principle contradict the proposition that the Charter is supreme over ordinary legislation and constitutes a new set of limitations on the powers of the federal Parliament and provincial legislatures.

The question to be investigated in this article is whether the "supremacy clause" of section 52(1) is a legally effective limitation on the powers of the federal Parliament and provincial legislatures. This question requires answers to a progression of three questions. (1) Has the Constitution Act, 1982 (which includes both the Charter and the supremacy clause) been validly enacted for Canada by the United Kingdom Parliament? (2) Has the Constitution Act, 1982 been effectively "entrenched" so that it cannot be repealed or amended except in compliance with the amending procedures prescribed by Part V of the Constitution Act, 1982? (3) Is the supremacy clause itself valid and effective in rendering statutes which are inconsistent with the Constitution of Canada (including the Charter) of no force or effect? I hasten to reassure the reader that I conclude that affirmative answers must be given to all three questions. I do not conclude that our new constitution is unconstitutional!

I. Validity of Constitution Act, 1982.

The Constitution Act, 1982 was never enacted by any legislative body in Canada.⁷ It consists of a schedule (Schedule B) to the Canada Act 1982,⁸ a statute enacted on March 29th, 1982 by the United Kingdom Parliament.⁹ The Canada Act 1982, by section 1, purports to "have the force of law in Canada", and the Act recites in the preamble that "Canada has requested and consented to the enactment of [the Act]".¹⁰ The question whether the Constitution Act, 1982 has been validly enacted for Canada is therefore a question about the legislative power over Canada of the United Kingdom Parliament.¹¹ Did the United Kingdom Parliament have the power to enact

⁷ Its terms were however approved by a joint resolution of the Senate and House of Commons of the Parliament of Canada, which requested the enactment by the United Kingdom Parliament of the Canada Act 1982 and its schedule, the Constitution Act, 1982. The resolution was passed by the Canadian House of Commons on December 2nd, 1981 and by the Canadian Senate on December 8th, 1981.

⁸ *Supra*, footnote 1.

⁹ The Canada Act received royal assent and came into force on March 29th, 1982. The coming into force of the Constitution Act, 1982 was, by s. 58, postponed to "a day to be fixed by proclamation", and that day was fixed as April 17th, 1982.

¹⁰ *Supra*, footnote 7.

¹¹ Although this is a question about the power of the United Kingdom Parliament, it is a question about its power over Canada, and that is a question of Canadian law which can

for Canada the Canada Act 1982 (including Schedule B, the Constitution Act, 1982)? This question relates to the validity not only of the Charter, which is Part I of the Constitution Act, 1982, and the supremacy clause, which is section 52(1) of the Constitution Act, 1982, but also of all of the other provisions of the Constitution Act, 1982, including the native rights guarantee (Part II), the amending procedures (Part V) and the natural resources clause (Part VI).

The Statute of Westminster, 1931¹² was enacted by the United Kingdom Parliament to remove some of the vestiges of colonial status which still clung inappropriately to Canada and the other self-governing Dominions¹³ of the British Empire (or Commonwealth as it was by 1931 starting to be called). The Statute of Westminster, by section 2, conferred on each Dominion the power to amend or repeal imperial statutes¹⁴ extending to that Dominion. However, the Statute of Westminster did not adopt the straightforward course of abrogating the legislative power over the Dominions of the United Kingdom Parliament, because in 1931 the dominant theory among British and Dominion constitutional lawyers was that a sovereign parliament could not legally limit its powers.¹⁵ In the case of

only be determined conclusively by Canadian courts. In *Manuel v. A.-G.*, High Court of Justice, Chancery Division, May 7th, 1982, to be reported in Canadian Rights Reporter, the validity of the Canada Act 1982 and its schedule the Constitution Act, 1982 was challenged by various Indian bands in the English courts. Megarry V.C. dismissed the challenge on the simple basis that "once an instrument is recognized as being an Act of Parliament, no English court can refuse to obey it or question its validity". His lordship held that his decision would have been the same even if an Act of Parliament purported to apply in "a foreign state which has never been British". He said: "No doubt the Act would normally be ignored by the foreign state and would not be enforced by it, but that would not invalidate the Act in this country." These dicta emphasize that the English court will view the issue quite differently from the court of the country where the Act purports to apply, and the latter court will regard the attitude of the English court as inconclusive if not totally irrelevant. This point is briefly elaborated in Hogg, Comment, (1982), 60 Can. Bar Rev. 307, at p. 329, and in more detail in Slaterry, The Independence of Canada (1982), to be published in the Supreme Court Law Review.

¹² U.K., 22 Geo. V, c. 4; R.S.C. 1970, Appendix II, No. 26. The leading work on the Statute of Westminster is Wheare, *The Statute of Westminster and Dominion Status* (5th ed., 1953), of which ch. 5 (The Statute and the United Kingdom Parliament) and ch. 6 (The Statute and the Legal Status of Canada) are especially useful with respect to Canada.

¹³ The term "Dominion" was defined in s. 1 of the Statute of Westminster as meaning Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland.

¹⁴ Imperial statutes were statutes enacted by the United Kingdom Parliament for some part of the British Empire (or Commonwealth), although they were sometimes applicable within the United Kingdom itself as well. Before the Statute of Westminster they constituted a limitation on the powers of the legislative assemblies of the Dominions because an imperial statute could be amended or repealed only by the United Kingdom Parliament and any law enacted by a Dominion legislative assembly was void to the extent of inconsistency with an imperial statute.

¹⁵ Wheare, *Constitutional Structure of the Commonwealth* (1960), p. 25. Since the second world war expert opinion has shifted on this point: see, e.g., de Smith, *Constitutional and Administrative Law* (3rd. ed., 1977), p. 76; and most of the former British colonies

Canada, there was in 1931 a second, more practical reason for the preservation of the legislative authority of the United Kingdom Parliament, and that was the fact that the British North America Act lacked special procedures for its amendment within Canada. So long as that disability remained, it was necessary that the United Kingdom Parliament retain its power to amend at least the British North America Act. For these two reasons the Statute of Westminster, by sections 4 and 7(1), preserved the legislative authority over Canada of the United Kingdom Parliament.¹⁶

Canada (like the other Dominions) was protected from future exercises of imperial legislative power by a convention which was adopted by the prime ministers of the United Kingdom and all of the Dominions at the imperial conference of 1930. The convention so adopted was that the United Kingdom Parliament would not enact a statute extending to a Dominion "otherwise than at the request and with the consent of that Dominion". This convention was not actually enacted into law by the Statute of Westminster, but it was recited in the preamble to the Statute.¹⁷ However, the convention was supplemented by section 4 of the Statute of Westminster. Section 4 provided that any statute of the United Kingdom Parliament extending to a Dominion must include an express declaration "that the Dominion has requested, and consented to, the enactment thereof". This latter statutory requirement applied to statutes extending to Canada as well as to each of the other Dominions, but it did not apply to statutes amending the British North America Act, because section 7(1) of the Statute provided that "nothing in this Act" was to apply to "the repeal, amendment or alteration of the British North America Acts, 1867 to 1930". Of course, the convention, which existed outside the Statute of Westminster, did apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930. Therefore, United Kingdom statutes amending the British North America Acts were required by convention to be enacted only at the request and with the consent of Canada, but were not required by statute to include an express declaration that the request and consent had been obtained.¹⁸

which have achieved independence after the second world war have sought and obtained in their independence statutes an abdication by the United Kingdom Parliament of legislative power over the newly-independent country. The new theory that such an abdication is legally effective also underlies s. 2 of the Canada Act 1982 which constitutes an abdication by the United Kingdom Parliament of its authority over Canada.

¹⁶ With the enactment of s. 2 of the Canada Act 1982 (see previous footnote), ss 4 and 7(1) of the Statute of Westminster could be repealed for Canada, and they were repealed by s. 53 of the Constitution Act, 1982: see schedule to the Constitution Act, 1982, item 17.

¹⁷ The preamble states: "And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:"

¹⁸ This article will not discuss the difficult and much debated question of the effect of a statute enacted for Canada in breach of either the convention or s. 4 (where it is applicable).

In *Reference re Resolution to Amend the Constitution* (1981)¹⁹ the Supreme Court of Canada, by a seven-judge majority (Laskin C.J., Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.; Martland and Ritchie JJ. dissenting), after first declaring that "the authority of the British Parliament or its practices and conventions are not matters upon which this Court would pronounce",²⁰ went on to say that the United Kingdom Parliament's authority over Canada is "untrammelled",²¹ it was "untouched" by the Statute of Westminster,²² it remains "omnipotent",²³ "unimpaired"²⁴ and "undiminished".²⁵ If their lordships intended to say that the power over Canada of the United Kingdom Parliament was subject to no limits whatsoever, these statements were in my view wrong,²⁶ and in any event went far beyond what was necessary to answer the questions posed in the reference. The holding that was necessary to answer the questions posed on the reference was that the United Kingdom Parliament, acting at the request and with the consent of the two houses of the Parliament of Canada, had the legal authority to enact the Canada Act 1982. The case certainly stands for that proposition.²⁷

The decision of the Supreme Court of Canada in *Reference re Resolution to Amend the Constitution* also stands for the proposition that the consent of the provinces was not required by law for the enactment of the Canada Act 1982. At the time when the Supreme Court of Canada rendered its decision (September 1981), only two provinces supported the federal proposals for constitutional change. The court held that the requirement of a "substantial degree" or a "substantial measure" of provincial consent,²⁸ while it was not satisfied by only two provinces out of ten, was a require-

There is Privy Council authority for the position that neither the convention (*Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645, at p. 723) nor s. 4 (*British Coal Corporation v. The King*, [1935] A.C. 500, at p. 520) is strictly binding on the United Kingdom Parliament. But neither of these holdings is free from doubt: see, e.g., *re disregard of convention*, Hogg, *op. cit.*, footnote 11, at pp. 326, 330; and *re disregard of s. 4*, de Smith, *op. cit.*, footnote 15, pp. 74-75.

¹⁹ [1981] 1 S.C.R. 753.

²⁰ *Ibid.*, at p. 774.

²¹ *Ibid.*, at p. 790.

²² *Ibid.*, at p. 794.

²³ *Ibid.*, at p. 797.

²⁴ *Ibid.*, at p. 799.

²⁵ *Ibid.*, at p. 801.

²⁶ Hogg, *op. cit.*, footnote 11, at p. 330.

²⁷ The resolution passed in December 1981 by the Senate and House of Commons of the Parliament of Canada which formed the basis of the final version of the Canada Act 1982 (*supra*, footnote 7) differed in some respects from the resolution passed in April 1981 which was the subject of the decision of the Supreme Court of Canada. But the changes were not material to the answer to the question of law posed to the court. It is clear that the decision is equally applicable to the final form of the constitutional resolution.

²⁸ *Supra*, footnote 19, at p. 905.

ment of convention only, not of law. As the seven-judge majority said: "The law knows nothing of provincial consent, either to a resolution of the federal Houses or as a condition to the exercise of United Kingdom legislative power."²⁹

After the decision of the Supreme Court of Canada had been rendered, a federal-provincial agreement was arrived at which raised the level of provincial support for a (somewhat altered) constitutional resolution from two provinces to nine. It was by no means clear that this new agreement satisfied the court's requirement of a "substantial measure" of provincial consent since the dissenting province was Quebec.³⁰ That question was submitted to the Supreme Court of Canada on a reference directed by the Quebec government, and the court held that the requisite substantial measure of provincial consent had been achieved despite Quebec's dissent.³¹ In any event, even if the decision had gone the other way, the absence of Quebec's consent would only have been a breach of convention,³² and thus devoid of legal consequences.³³ Therefore, the absence of Quebec's consent to the resolution proposing the enactment of the Canada Act 1982 could not affect the legal authority of the United Kingdom Parliament to enact the Act.

Moving from the realm of convention to that of law, it will be recalled that section 4 of the Statute of Westminster imposed the legal requirement that a statute of the United Kingdom Parliament which extended to Canada must contain an express declaration that Canada has "requested, and consented to" the enactment of the statute. It will also be recalled that, by virtue of section 7(1) of the Statute of Westminster, this express declaration is not required in a United Kingdom statute which can be characterized as coming within the phrase "the repeal, amendment or alteration of the British North America Acts, 1867 to 1930". Probably, the provisions of the Canada Act 1982 come within this phrase,³⁴ and if so there is no requirement of an express declaration. Nevertheless, the Canada Act 1982 includes in its preamble an express declaration that "Canada has requested

²⁹ *Ibid.*, at p. 807.

³⁰ The question was whether the court's test was satisfied merely by a high numerical measure of consent (nine out of ten), or whether the agreement should also reflect the principle of duality (implying the protection of the powers of the only predominantly French-speaking province).

³¹ *A.-G. Que. v. A.-G. Can.*, Supreme Court of Canada decision of December 6th, 1982, not yet reported.

³² The question posed by the Quebec government asked only whether a "convention" had been broken, and the court addressed only that question.

³³ *Supra*, footnote 19, at p. 880.

³⁴ Only a few provisions of the British North America Acts, 1867 to 1930 are directly repealed or amended by the schedule to the Constitution Act, 1982, but it seems reasonable to treat the entire set of provisions of the Canada Act 1982 and the Constitution Act, 1982 as an "alteration" of the British North America Acts, 1867 to 1930.

and consented to the enactment of [the Act]". The cautious inclusion of the express declaration makes clear that, just in case any provision of the Canada Act 1982, including its schedule, the Constitution Act, 1982, is not a "repeal, amendment or alteration of the British North America Acts, 1867 to 1930", the provision has been enacted in compliance with section 4 of the Statute of Westminster.³⁵

I conclude that the United Kingdom Parliament had the power to enact into Canadian law the Canada Act 1982 and its schedule, the Constitution Act, 1982; and that they were validly enacted into Canadian law.

II. *Entrenchment of Constitution Act, 1982.*

Assuming that I am right that the Canada Act 1982, and its schedule, the Constitution Act, 1982, have been validly enacted into Canadian law, the question remains: have they been effectively entrenched?

Section 52(3) of the Constitution Act, 1982 purports to entrench all of the provisions of the "Constitution of Canada", a phrase which is defined in section 52(2) as including the Canada Act 1982 and the Constitution Act, 1982. Section 52(3) provides that amendments to the Constitution of Canada may be made "only in accordance with the authority contained in the Constitution of Canada". That is, of course, a reference to the amending procedures of Part V of the Constitution Act, 1982. Part V of the Constitution Act, 1982 prescribes the procedures for amending the Constitution of Canada. All of its provisions, except for sections 44 and 45, prescribe a more elaborate procedure than the ordinary legislative process.

The answer to the question whether the Constitution Act, 1982 is effectively entrenched depends upon whether section 52(3) of the Constitution Act, 1982 is itself immune from ordinary legislative change. I have already shown that section 52(3), in common with all the other provisions enacted by the Canada Act 1982, is a valid law for Canada. But the question remains whether sections 2(2) and 7(2) of the Statute of Westminster would authorize the federal Parliament or a provincial legislature to repeal or amend section 52(3). Section 2(2) of the Statute of Westminster confers on the Parliament of a Dominion (including the Parliament of Canada) "the power to repeal or amend" any "existing or future Act of Parliament of the United Kingdom" which is part of the law of Canada. Section 7(2) of the Statute of Westminster confers the same power on the legislatures of the Canadian provinces. What is to stop the federal Parliament or a provincial legislature from repealing or amending section 52(3) of the Constitution Act, 1982?

³⁵ As noted, *supra*, footnote 18, it is arguable, on the basis of *British Coal Corporation v. The King*, [1935] A.C. 500, at p. 520, that, even if s. 4 had not been complied with, the validity of the Canada Act 1982 and its schedule, the Constitution Act, 1982, would not have been affected.

One reason why the federal Parliament or a provincial legislature cannot repeal or amend section 52(3) of the Constitution Act, 1982 is to be found within the Statute of Westminster itself. The powers conferred by sections 2(2) and 7(2) of the Statute of Westminster, to repeal or amend a statute of the United Kingdom Parliament extending to Canada, are expressly restricted by section 7(3) of the Statute of Westminster to "the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively". The reference to "competence" must mean competence at any given time. The intent of section 7(3) is to confine each legislative body's power to enact laws which repeal or amend United Kingdom statutes extending to Canada within exactly the same limits as confine that legislative body's power to enact laws generally. Bearing in mind that section 52(3) of the Constitution Act, 1982, has validly prescribed some new restrictions on the competence of the Parliament of Canada and the legislatures of the Provinces, it is clear from section 7(3) of the Statute of Westminster that neither the Parliament nor the legislatures can escape from those restrictions. The Parliament and the legislatures are bound by section 52(3).

An attempt by the Parliament (for example) to amend section 6 (mobility rights) of the Constitution Act, 1982 (for example) would be met with the conclusive objection that section 52(3) of the Constitution Act, 1982 denies to the Parliament acting alone the competence to amend section 6. Since section 6 is part of the Constitution of Canada, the only legislative process which could amend section 6 is the combination of legislative acts prescribed by section 38 of the Constitution Act, 1982.³⁶ An attempt by the Parliament to amend section 52(3) itself would be met with exactly the same conclusive objection. Section 52(3) is itself part of the Constitution of Canada, and therefore section 52(3) denies to the Parliament acting alone the competence to amend section 52(3). The only legislative process which could amend section 52(3) is the combination of legislative acts prescribed by either section 38 or section 41(e) (I am not sure which). If we substitute a legislature for the Parliament in the foregoing examples, or if we change the provision of the Constitution Act, 1982, the answer will still be the same. The Parliament or a legislature can do only those things which the Constitution of Canada, as amended by the Constitution Act, 1982, authorizes the Parliament or a legislature to do.

This result in my opinion follows from the express language of section 7(3) of the Statute of Westminster. But even if section 7(3) did not exist I would still reach exactly the same conclusion. The logic of limited legisla-

³⁶ S. 38 requires resolutions of the Senate and House of Commons, and of the legislative assemblies of two-thirds of the provinces having a combined population of fifty per cent of the total population of all of the provinces. In addition, if the amendment derogates from the legislative powers of the provinces, (as the addition of a new right would do), a province could "opt out" of the amendment under s. 38(3).

tive competence entails the conclusion that a law which limits the powers of a legislative body cannot be altered by that legislative body. For this reason, the better view is that section 7(3) was not really necessary to protect from domestic amendment limits on the competence of a Canadian legislative body.³⁷ Limits on the competence of a Canadian legislative body, such as those imposed by section 52(3) of the Constitution Act, 1982, cannot be amended unilaterally by that body for the same reason that a man cannot lift himself by his own bootstraps.

I conclude that section 52(3) of the Constitution Act, 1982 cannot be repealed or amended by ordinary legislative action, and therefore that section 52(3) is effective to entrench the "Constitution of Canada" of which the Constitution Act, 1982, and therefore the Charter, is a part. The Charter can be amended only by the procedures stipulated in section 38 of the Constitution Act, 1982.³⁸

III. *Supremacy of Constitution Act, 1982.*

Is the Constitution Act, 1982 "supreme" in the sense that it will invalidate (render of no force or effect) inconsistent laws enacted by the Parliament or a legislature? This question would arise if the Parliament or a legislature made no attempt to enact an amendment of some provision of the Constitution Act, 1982, but enacted a law which was inconsistent with the provision of the Constitution Act, 1982. In this situation, as a matter of logic, one of the two inconsistent laws must prevail over the other. It is the provision of the Constitution Act, 1982 which prevails over the federal or provincial statute. This is so because section 52(1) of the Constitution Act, 1982 provides that any law which is inconsistent with the provisions of the Constitution of Canada (which, it will be recalled, includes the Canada Act 1982 and the Constitution Act, 1982) "is, to the extent of the inconsistency, of no force or effect". Section 52(1) is a restriction on the competence of the federal Parliament and the provincial legislatures just like section 52(3), and it is binding on those bodies for exactly the same reasons as were given in the previous section of this article for section 52(3).

The same result may be reached by slightly different reasoning. When a court is faced with an inconsistency between a provision of the Constitution Act, 1982 (or any other part of the Constitution of Canada) and a statute (whether federal or provincial) it must resolve the inconsistency by applying the law respecting such inconsistencies. That law is supplied by section 52(1) of the Constitution Act, 1982. That law is part of the Constitution of Canada, and therefore by virtue of section 52(1) can only be amended by the procedures laid down in Part V of the Constitution Act, 1982. The court cannot therefore hold that section 52(1) has been impliedly repealed or amended by the enactment of an ordinary statute (whether

³⁷ Wheare, *op. cit.*, footnote 15, p. 69; Hogg, *op. cit.*, footnote 5, p. 44.

³⁸ The requirements of s. 38 are summarized, *supra*, footnote 36.

federal or provincial). The court must apply section 52(1) and hold that the statute yields to the Constitution Act, 1982.

I suppose that a faint argument could be made that section 52(1) of the Constitution Act, 1982 is inconsistent with section 2(2) of the Statute of Westminster. Section 2(2) of the Statute of Westminster provides that no law of a Dominion "shall be void or inoperative on the ground that it is repugnant to . . . any existing or future Act of Parliament of the United Kingdom". Section 2(2) applies to provincial as well as federal laws by virtue of section 7(2). But, as noted earlier in this article, section 2(2) is qualified by section 7(3), which restricts the powers of the Parliament of Canada and the provincial legislatures "to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively". When section 2(2) is read with section 7(3), the apparent inconsistency between section 2(2) and section 52(1) of the Constitution Act, 1982 disappears. As argued earlier in this article, since section 52(1) creates a limitation on the powers of each Canadian legislative body, it creates a rule which cannot be repealed or amended by a Canadian legislative body. If I am wrong in this argument, and there is inconsistency between section 2(2) of the Statute of Westminster and section 52(1) of the Constitution Act, 1982, then the inconsistency would in any case be resolved by the doctrine of implied repeal³⁹ in favour of the later enactment, which is of course section 52(1) of the Constitution Act, 1982.⁴⁰

I conclude therefore that the supremacy clause of section 52(1) of the Constitution Act, 1982 is effective to make the Constitution Act, 1982 (as well as the other parts of the Constitution of Canada) supreme in the sense that it will invalidate inconsistent laws enacted by the Parliament or a legislature.

Conclusions

1. The Constitution Act, 1982 has been validly enacted for Canada by the United Kingdom Parliament. This is so because the power over Canada of the United Kingdom Parliament is sufficient to enact the Constitution Act, 1982; and this is so whether or not the Constitution Act, 1982, or any provision thereof, is properly characterized as a "repeal, amendment or alteration of the British North America Acts, 1867 to 1930".

2. The Constitution Act, 1982 is entrenched in the sense that it cannot be repealed or amended except in compliance with the amending procedures prescribed by Part V of the Constitution Act, 1982. This is so because

³⁹ Driedger, *The Construction of Statutes* (1974), pp. 174-175.

⁴⁰ The doctrine of implied repeal would be the relevant rule to resolve the inconsistency because both laws were enacted by the same body (the United Kingdom Parliament) and *both* laws are within the phrase the "Constitution of Canada" (so that s. 52(1) cannot resolve the inconsistency).

section 52(3) constitutes a restriction on the competence of the federal Parliament and provincial legislatures from which they are powerless to escape.

3. The Constitution Act, 1982 is supreme in the sense that any law enacted by the federal Parliament or a provincial legislature which is inconsistent with the Constitution Act, 1982 is of no force or effect. This is so because section 52(1) says it is so, and section 52(1) cannot be repealed or amended except in compliance with the amending procedures prescribed by Part V of the Constitution Act, 1982.

4. The Canadian Charter of Rights and Freedoms, which is Part I of the Constitution Act, 1982, is therefore supreme.
